

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

DANIEL THOMPSON,

Petitioner,

v.

CITY OF MERCER ISLAND,

Respondent.

Case No. 14-3-0010

ORDER OF DISMISSAL

This matter came before the Board on the City of Mercer Island's Motion to Dismiss for Lack of Jurisdiction and Lack of Ripeness (Motion to Dismiss), and Motion to Strike Petitioner's Statement Addressing Jurisdiction, Ripeness and Actions Being Challenged, both filed November 4, 2014. Daniel Thompson, the petitioner and attorney acting pro se, filed Petitioner's Response to City of Mercer Island's Motions to Strike and to Dismiss for Lack of Jurisdiction and Lack of Ripeness (Petitioner's Response), November 19, 2014. Mercer Island replied with Respondent's Reply to Petitioner's Response to City's Motion to Dismiss (City Reply), filed November 25, 2014.

The Board addresses first the City's motions to strike, then the questions of jurisdiction and ripeness. The Board determines it lacks subject matter jurisdiction as limited by RCW 36.70A.280(1)(a) and RCW 36.70A.290(2). The petition is dismissed.

MOTIONS TO STRIKE

In its November 4, 2014 motion to strike, Mercer Island moves to strike the portion of Petitioner's October 21, 2014, filing captioned: "Petitioner's Statement Addressing Jurisdiction, Ripeness and Actions Being Challenged" (Petitioner's Statement). The City asserts Petitioner's Statement is legal argument not allowed as part of a petition or

1 amended petition under WAC 242-03-260(1) or within the provisions of the prehearing order
2 in the case.

3 The Board agrees with the City that Petitioner's Statement was out of place when
4 filed as an amendment to the petition for review. However, "to the extent the statement is
5 argument or briefing" Thompson has incorporated the statement into his response to the
6 City's Motion to Dismiss.¹ The Board denies the motion to strike Petitioner's Statement and
7 will consider the facts and arguments therein as part of petitioner's response to the City's
8 dispositive motion.
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10 In a second motion to strike, the City asserts the Petitioner's Response was untimely
11 filed in violation of WAC 242-03-550 and should be stricken.² Thompson acknowledges the
12 response was not filed and served electronically until 5:48 p.m., November 18, 2014.³
13

14 Board rules provide that briefs must be filed according to the schedule in the
15 prehearing order. WAC 242-03-590(2). Documents not filed before 5 pm are stamped
16 received on the following day. WAC 242-03-240(1). The scheduled deadline for the
17 response brief was November 18 and the tardy submittal was stamped November 19.
18 Petitioner's Response was not timely filed.⁴ However, the Board allows it in order to ensure
19 the Board's decision on jurisdiction is made on the full facts and arguments presented by
20 the parties. The Board denies the second motion to strike.
21

22 MOTION TO DISMISS - JURISDICTION

23 The City moves to dismiss Thompson's petition on the grounds the Growth Board
24 lacks jurisdiction to review a project permit approval. Thompson's petition challenges the
25 Mercer Island Planning Commission's denial of his appeal of SUB 13-008, a Preliminary
26 Short Plat Approval for a two-lot property. On October 22, 2014, Thompson filed
27 "Attachments to Petition Outlining Actions Challenged," listing five items (hereafter, PFR
28 Attachments):
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31 ¹ Petitioner's Response, at 2.

32 ² Motion to Strike Petitioner's Response to City's Motion to Strike and to Dismiss (November 20, 2014).

³ Petitioner's Response to City's Motion to Strike Petitioner's Response (November 26, 2014) at 4-5.

⁴ Thompson has not provided any facts showing good cause for the untimely filing. The City has not asserted any prejudice caused by the delay.

1. Mercer Island Development Services Group 2/4/2013 preliminary approval of SUB 13-008.
2. 7/28/2014 Planning Commission's written Findings/Conclusion/Decision upholding the Preliminary Approval.
3. 7/23/2014 Condensed Hearing transcript.
4. 7/23/2013 Planning Commission minutes summarizing the hearing and actions taken, and the post hearing discussion and motion requesting the City Council to direct staff to restrict the definition of tract and short plats as it relates to vehicular access.
5. 7/23/2013 Transcript of second half of hearing/meeting before the Planning Commission.

The PFR Attachments lay out the City actions challenged by Thompson. The short plat at issue concerns two adjacent residential lots which the property owner sought to reconfigure by creating an access road as a separate tract to serve both lots. The application was approved by the city code official.⁵ Thompson appealed to the Mercer Island Planning Commission. The commission considered Thompson's appeal in an open record hearing.⁶ The commission voted to uphold the staff approval, adopting staff's proposed findings of fact and conclusions of law without modification.⁷ The commission then discussed and adopted a motion requesting city council to direct staff to revise the regulation that allowed creation of a separate tract for vehicular access.⁸ The planning commission issued its written decision upholding the SUB 13-008 Preliminary Short Plat on July 28, 2104.⁹

⁵ PFR, Attachment 1, Mercer Island Development Services Group 2/4/2013 preliminary approval of SUB 13-008.

⁶ PFR, Attachment 3, 7/23/2014 Condensed Planning Commission Hearing transcript.

⁷ PFR, Attachment 4, 7/23/2013 Planning Commission minutes.

⁸ PFR, Attachment 5, 7/23/2013 Transcript of second half of hearing/meeting before the Planning Commission, submitted separately on October 31, 2014, when the transcript was available.

⁹ PFR Attachment 2, 7/28/2014 Planning Commission's written Findings/Conclusion/Decision upholding the Preliminary Approval of SUB 13-008.

1 On September 19, 2014, Thompson filed this action before the Board. The City
2 moves for dismissal, asserting project permit appeals are outside GMA jurisdiction.¹⁰
3 Thompson, in response, seeks to invoke the Growth Board's jurisdiction by contending that
4 the city's action was a de facto amendment to its zoning code and regulations. He argues
5 that the use of an access tract to serve the two lots is not authorized in the code and
6 conflicts with provisions of the City's comprehensive plan.¹¹ Thompson asserts that the
7 effect of the City's action is to rezone the property or to revise City short plat regulations. He
8 contends the Board has jurisdiction because the City's action is "a de facto amendment to
9 the development regulations and zoning provisions that are within the Board's jurisdiction
10 under RCW 36.70A.280."¹²

12 The Board must look to the Growth Management Act to determine if a petition is
13 within its jurisdiction. The Growth Board has exclusive authority to rule on challenges that a
14 governmental agency is not in compliance with the requirements of the GMA. See *Spokane*
15 *County v. Eastern Washington Growth Management Hearings Board*, 160 Wn. App. 274,
16 281, 250 P.3d 1050 (2011), *review denied*, 171 Wn.2d 1034 (2011). Under RCW
17 36.70A.280(1)(a), the Board has very limited jurisdiction which encompasses "only those
18 petitions" challenging whether a city's comprehensive plan, development regulations, or
19 amendments thereto comply with the GMA, SMA, and SEPA. *Somers v. Snohomish*
20 *County*, 105 Wn. App. 937, 942, 21 P.3d 1165 (2001). The GMA "is not to be liberally
21 construed." *Woods v. Kittitas County*, 162 Wn.2d 597, 612 n.8, 174 P.3d 25 (2005).

23 A petition for review filed with the GMHB must include a detailed statement of the
24 legal issues presented for resolution by the Board. RCW 36.70A.290(1). The Board
25 examines the petitioner's statement of issues to determine whether each legal issue falls
26 within the Board's statutory subject matter jurisdiction. *Five Mile Prairie Neighborhood*
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30 ¹⁰ Motion to Dismiss, at 5-6.

31 ¹¹ Petitioner's Statement, at 4.

32 ¹² Legal Issue 1: "Is the Planning Commission's decision and bases for decision upholding the Preliminary Approval ("Decision") a de facto amendment to the development regulations and zoning provisions that fall under the board's jurisdiction under RCW.70A.280?"

Legal Issue 10 also characterizes the City's action as "the adoption of de facto zoning amendments and de facto amendments to development regulations."

1 *Association v. Spokane County*, GMHB No. 12-1-0002, Final Decision and Order (August
2 23, 2012), at 6.

3 In *Five Mile Prairie*, the Board explained the statutory dichotomy of planning versus
4 permit appeals. Under the Growth Management Act (RCW 36.70A.280), review of political
5 decisions regarding the broad nature of local area planning is by the GMHB, which is
6 responsible for ensuring the decisions are consistent with the GMA. Under the Land Use
7 Petition Act (LUPA) (RCW 36.70C.030), review of land use actions relating to specific
8 property is by the superior court, which must confirm that statutory and constitutional
9 processes have been followed.¹³

10
11 Thus, the Growth Board has exclusive jurisdiction to decide whether a challenged
12 development regulation complies with the GMA. The GMA defines “development
13 regulation” as follows:

14 “Development regulations” or “regulation” means the controls placed on
15 development or land use activities by a county or city, including, but not
16 limited to, zoning ordinances, critical areas ordinances, shoreline master
17 programs, official controls, planned unit development ordinances, subdivision
18 ordinances, and binding site plan ordinances together with any amendments
19 thereto. **A development regulation does not include a decision to**
20 **approve a project permit application**, as defined in RCW 36.70B.020,
21 even though the decision may be expressed in a resolution or ordinance of
the legislative body of the county or city.¹⁴

22 In contrast, the superior court has exclusive jurisdiction under LUPA to decide an
23 appeal of a land use decision on an application for a project permit.¹⁵ The term “land use
24 decision” means *inter alia* a final determination by a local jurisdiction’s body or officer with
25 the highest level of authority to make the determination on an “application for a project
26 permit”, but excluding applications for legislative approvals such as area-wide rezones.¹⁶

27
28 RCW 36.70C.020(4) defines the term “project permit” as follows:

29
30 ¹³ The Supreme Court recently reiterated the distinction between “legislative” amendments changing the
31 designation of land (GMHB jurisdiction) and “quasi-judicial” decisions rezoning specific property (superior court
jurisdiction). *Stafne v. Snohomish Co.*, 174 Wn.2d 24, 271 P.3d 868 (2012).

32 ¹⁴ RCW 36.70A.030(7) [Emphasis added].

¹⁵ RCW 36.70C.030.

¹⁶ RCW 36.70C.020(2). Petitioner’s Response, at 9-10, characterizes the present matter as a “final land use
action.”

1 "Project permit" or "project permit application" means any land use or
2 environmental permit or license required from a local government for a
3 project action, including but not limited to building permits, subdivisions,
4 binding site plans, planned unit developments, conditional uses, shoreline
5 substantial development permits, **site plan review**, permits or approvals
6 required by critical area ordinances, site-specific rezones authorized by a
7 comprehensive plan or subarea plan, but excluding the adoption or
8 amendment of a comprehensive plan, subarea plan, or development
9 regulations except as otherwise specifically included in this subsection.¹⁷

10 A binding site plan or site plan review "required from a local government for a project action"
11 is a "project permit," and thus is a "land use decision" exclusively reviewed in superior court
12 under LUPA.

13 In *BD Lawson Partners, LP v. Central Puget Sound Growth Management Hearings*
14 *Board*, 165 Wn. App. 677, 269 P.3d 300 (2011), the Court of Appeals drew a clear
15 distinction between development regulation amendments, which may be appealed to the
16 Growth Board, and project permits which must be appealed to superior court. The Court
17 stated: "The Board does not have jurisdiction to decide challenges to project permit
18 applications or site-specific land use decisions, because such decisions do not qualify as
19 comprehensive plans or development regulations."¹⁸ Citing the definitions of "development
20 regulations" in the GMA and "project permit application" in RCW 36.70B.020(4), the Court
21 explained:

22 Thus, a project permit application is not a development regulation. The items
23 listed under 'project permit application' are specific permits or licenses; more
24 general decisions such as adoption of a comprehensive plan or subarea plan
25 are not approvals of project permit applications.¹⁹

26 In sum, if a petitioner challenges an amendment to the city's comprehensive plan or
27 development regulations, the GMHB has exclusive jurisdiction. If the petitioner challenges a
28 project permit decision, the superior court has jurisdiction under LUPA.²⁰

31 ¹⁷ RCW 36.70B.020(4) [Emphasis added].

32 ¹⁸ 165 Wn. App. at 684.

¹⁹ 165 Wn. App. at 685 (citations omitted).

²⁰ See also, *Feil v. Douglas County*, EWGMHB No. 06-1-0012, Order on Motion to Dismiss (February 16, 2007), *aff'd Feil v. EWGMHB*, 153 Wn. App. 394, 220 P.3d 1248 (2009).

1 In the case before us, Thompson challenges denial of his appeal of Preliminary Plat
2 Approval SUB 13-008 which was clearly part of a project permit review. The developer had
3 submitted a permit application to the City of Mercer Island permit authorities. The application
4 was reviewed pursuant to the City's municipal code requirements and a preliminary plat
5 approval was issued by the code official. Thompson appealed the plat approval to the city's
6 planning commission which convened a hearing, heard testimony, debated the questions
7 raised, and upon full consideration affirmed the SUB 13-008 Preliminary Plat Approval.²¹ In
8 issuing the approval, the City permit staff and the planning commission applied the existing
9 comprehensive plan provisions, zoning designation, and development regulations.²² The
10 Preliminary Plat Approval did not on its face amend the zoning or any development
11 regulation.
12

13 According to the planning commission, the subject property is zoned Single Family
14 Residential R-12 and creation of a separate tract for ingress/egress did not make either of
15 the residential lots non-conforming.²³ Thompson, however, questions "the use of these
16 Tracts to hold impervious surface for easements for vehicular access in order to avoid that
17 impervious surface counting against the building lot."²⁴ The Mercer Island development
18 code MICC 19.16.010 defines "Tract:"
19

20 A piece of land designated and set aside as either public or private open
21 space. No dwelling shall be constructed on the tract, and only those
22 structures that are in keeping with the tract's use as open space shall be
23 allowed.

24 The code does not indicate how an access tract with 100% impervious surface impacts the
25 calculations of impervious surface for the buildable lots or whether paved access counts
26 toward open space requirements. Thompson points to discrepancies between the city code
27 definition of "tract" which is open space but may be paved and devoted to transportation,
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30 ²¹ On August 14, 2014, Thompson filed a LUPA petition challenging the Preliminary Plat Approval in King
County Superior Court. Thompson's LUPA appeal was dismissed on November 7, 2014. City Reply, Ex. 1.

31 ²² PFR Attachment 2, Planning Commission Decision, incorporating PFR Attachment 1, Staff Findings of Fact,
at 2-4.

32 ²³ *Id* at 2-4, 11-12.

²⁴ Petitioner's Response, Ex. 1, Thompson letter to Mercer Island City Attorney Katie Knight (May 1, 2014), p.
2.

1 and the definition of “open space” contained in the Comprehensive Plan Parks and
2 Recreation Plan.²⁵ But Mercer Island counters that the comprehensive plan policies relate to
3 public open space and simply do not apply to open space reserved on private property.²⁶

4 The Board finds Thompson’s allegations amount to assertion of a violation of Mercer
5 Island’s development code in connection with a project permit application. Disputes raised
6 concerning whether the calculation of lot size or impervious surface allocation is consistent
7 with code provisions and definitions are project permit questions to be resolved through
8 administrative proceedings and appealed to superior court under LUPA. Ambiguities in the
9 code provisions or errors in code application do not convert the City’s interpretation and
10 application of the code into an amendment or de facto amendment of development
11 regulations. Nor does allowance of paved open space on private land for vehicular access
12 contravene any of the cited comprehensive plan policies concerning public open space.
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14 A de facto amendment may occur when an action has the “legal effect of amending
15 the plan, just as if the words of the plan had been changed.” *Alexanderson, et al., v. Clark*
16 *County Board of Commissioners*, 135 Wn. App. 541, 550, 144 P.3d 1219 (2006). In the
17 course of Mercer Island’s Planning Commission discussion, a commissioner raised
18 objection to the code provisions for creation of tracts and the results they may allow. After
19 approving the preliminary plat for this property, the commission passed a motion requesting
20 the city council to consider future code amendments. Under no stretch of the legal
21 imagination does the planning commission motion convert the SUB 13-008 Plat Approval
22 into a de facto zoning or de facto development regulation amendment. To the contrary, the
23 commission determined that existing zoning and development regulations support the
24 approval and that amendment of those regulations would be necessary if the City wanted to
25 restrict creation of access tracts in the future.
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28 **The Board finds** the City’s action challenged by Petitioner is not an amendment to a
29 comprehensive plan or development regulation.
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25 Petitioner’s Response, at 5, 6, and Attachments 6, Parks and Open Space Policies, and 7, 2014-2019 Parks
and Recreation Plan (excerpts).

26 City Reply, at 3.

The Board further finds Petitioner has failed to demonstrate that the City's action constitutes a de facto amendment to zoning or development regulations.

The Board concludes Thompson’s Petition for Review is not within the Board’s jurisdiction as limited by RCW 36.70A.280(1)(a) and .290(2). The City’s motion to dismiss for lack of jurisdiction is **granted**. The Petition for Review is **dismissed**.

MOTION TO DISMISS - RIPENESS

The City further moves for dismissal on the basis the matter is not ripe for review as there has been only a preliminary plat approval, not a final plat approval. The City also asserts the planning commission's request for city council consideration of regulatory amendments is not a final action ripe for review.²⁷ Thompson in response points out the planning commission's preliminary plat approval is a final decision that vests rights and thus is an appealable decision under the Mercer Island City Code. MICC 19.15.101(E).²⁸

The Board has determined the challenged action is not within the Board's jurisdiction as expressly limited by RCW 36.70A.280. Thus whether it is ripe for review is not a question for the Board to decide.

ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the Growth Management Act, prior Board orders and case law, and having deliberated on the matter, the Board ORDERS:

- The motion of Respondent City of Mercer Island to dismiss for lack of jurisdiction is **granted**.
- The Petition for Review of *Daniel Thompson v City of Mercer Island* is **dismissed**.
- GMHB Case No. 14-3-0010 is **closed**.

²⁷ Motion to Dismiss, at 13-14.

²⁸ Petitioner's Response, at 9-10.

1 SO ORDERED this 5th day of December 2014.

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Margaret Pageler, Board Member

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Cheryl Pflug, Board Member

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Raymond Paoella, Board Member

11 **Note: This is a final decision and order of the Growth Management Hearings Board**
12 **issued pursuant to RCW 36.70A.300.²⁹**
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30 _____
31 ²⁹ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all
32 parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days
as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent
upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings
Board is not authorized to provide legal advice.